IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-196

MICHAEL E. LINDSAY, RON WATSON
and DAVID L. DAY,
Plaintiffs,

v.

WESLEY BRABANT,
Plaintiff-Petitioner,

v.

THE CITY OF SEATTLE, ALLEN W. MONROE,
DONALD D. HALEY, ROBERT E. McGETTY
CIVIL SERVICE COMMISSIONER,
Defendants-Respondents,

ROBERT L. GREEN and the UNITED
CONSTRUCTION WORKERS ASSOCIATION,
Defendants in Intervention.

PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

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No. .....

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REPORT OF OPINION BELOW

The opinion of the Supreme Court of the State of Washington, the highest court in Washington State jurisdiction, is officially reported in 86 Wn.2d 698, 548 P.2d 320, and a copy of this opinion

is reproduced in the Appendix to this petition as Appendix A. The remittitur from the Supreme Court returned the case to the Superior Court for the State of Washington in and for the County of King, and provided that the written opinion became the final judgment of the court on May 11, 1976. The opinion of the Supreme Court upheld the ruling of the trial judge. A copy of the trial court's decision is attached hereto as Appendix B.

JURISDICTION

This petitioner seeks review of the final decision of the Washington State Supreme Court pursuant to 28 USC 1257(3), by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. The following questions are presented by this petition:

a. Whether the 14th Amendment of the United States Constitution prohibiting states from denying persons

within their jurisdiction the equal protection of laws or the deprivation of life, liberty and property without due process of law is violated by a rule of the Seattle Civil Service Commission giving a preference solely on the basis of race to certain minority persons to the detriment of non-minorities in competition for promotion within the Seattle Civil Service System.

b. Whether a rule of the Seattle Civil Service Commission which grants a preference solely on the basis of race to minority persons violates 42 USC § 2000e-2(J) which provides that nothing in Title VII of the Civil Rights Law shall be interpreted to require preferential treatment to remedy racial, sexual or other imbalance in a work force.

Constitutional Provision

14th Amendment

Section 1. All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

42 USC 2000e-2(J)

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by a labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or

national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Seattle's City Charter Provision

Article XVI

Section 9. The head of the department or office in which the office classified under this article is to be filled shall notify the commission of any vacancy, and the commission shall certify to the appointing officer the names and addresses, together with the notation of military, naval or marine service, if any, of such number of candidates, not less than five if there shall be so many eligible, standing first upon the register for the class or grade to which such position belongs as shall be equal to twenty-five percent of the total number of candidates on said register. The appointing officer shall notify the commission separately of each position to be filled, and shall fill such places by appointment from the persons certified to him by the commission therefor, which appointment shall be on probation for a period of twelve months, except for firemen where such period shall be six months. To facilitate the selection of appointees from the persons so certified, the appointing officer may require such persons to come before him, and shall be entitled to inspect such persons' examination papers, and may fill

such positions by appointment from the persons so certified without regard to their order of certification, subject to the preference herein provided for. The commission may strike off the names of candidates from the register after they have remained thereon for a time to be limited by rule. Before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of the commission, discharge him upon assigning in writing his reasons therefor to the commission. If he is not then discharged, his appointment shall be deemed complete. To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department may, with the approval of the commission, make temporary appointments to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this article can be made.

Civil Service Rule

7.03(j)

Where a certification of eligibles other than in the normal order is requested in writing by the appointing authority as being necessary to implement the Affirmative Action Program of the City of Seattle by achieving ratios of minority, female or handicapped employees in all classifications of city employment approximately equal to the ratios of these

same groups in the Seattle community, and the Secretary determines that the reasons given fully justify the request, a certification may be made of only the highest ranking eligibles of the particular race, creed, color, national origin or sex or the highest ranking handicapped eligibles, as designated in the request.

STATEMENT OF THE CASE

The City of Seattle maintains a system of Civil Service for municipal employment which is governed by the Seattle City Charter. Article 16, Section 9 of the Charter establishes a merit system by which eligible candidates are selected for municipal employment. A municipal official is required by this Section of the Charter to hire from the top 25% of those who passed the Civil Service Examination or, at least, from the top five candidates examined, whichever number is greater.

This City Charter provision governed municipal employment selection until

August 20, 1971 when the Seattle Civil Service Commission adopted Rule 7.03j. Civil Service Rule 7.03j changed the previously established hiring policies of the City with respect to merit hiring in an effort to achieve a more desirable minority employment ratio. Rule 7.03j permits the hiring and promotion of municipal employees who have passed a Civil Service Examination solely on the basis of race, creed, color, national origin or sex without regard to their scores on the examinations.

The petitioner, Wesley M. Brabant, was passed over for promotion even though he had scored within the top 25% of those taking the Civil Service Examination, in favor of Emeliano Ponce, who took and passed a promotional examination, but who also was below the percentile established by Article 16, Section 9 of the Seattle City Charter. The petitioner thus intervened in a pending lawsuit in the King

County Superior Court with other plaintiffs in order to protect his rights established by the Seattle City Charter and the United States Constitution. The other plaintiffs in that action were dismissed and the petitioner's case went to trial upon agreed facts resulting in an adverse decision by the trial court.

In his original complaint (Appendix C hereto), petitioner alleged that his constitutional rights were violated by the conduct of the City. In its Answer (Appendix D hereto), the City of Seattle alleged that its change in Civil Service policy was mandated by the 14th Amendment to the United States Constitution and the Civil Rights Act of 1964, as well as Presidential Executive Order 11246. A constitutional argument was made in the affidavit of Thomas F. Hanley, Secretary of the Civil Service Commission of the City of Seattle (Appendix E hereto).

Robert L. Green and the United

Construction Workers Association were allowed to intervene in the action as defendants. In the Answer of said intervenors, the constitutional issue was raised and the court was asked to determine the constitutional rights of the intervenors in addition to their rights under the Civil Rights Act of 1964, 42 USC 2000e, et seq. (Appendix F). All of the constitutional implications of affirmative action taken pursuant to the 1964 Civil Rights Act were raised and argued to the trial court.

A "Statement of Stipulated Facts and Issues of Law" is attached as Appendix G.

The Washington State Supreme Court, although it answered the 14th Amendment arguments of petitioner, gave indication that it did not feel as though that answer necessariy had to be given. The Supreme Court stated that since the parties had submitted an agreed statement

of stipulated facts and issues of law to the trial court in which they agreed that "There is no constitutional question of equal protection of the laws and due process presented", that the Supreme Court need not consider such an issue (see Appendix A). The Supreme Court missed the entire point of the agreed stipulation upon which this case was originally submitted to the trial court. The Supreme Court quoted the stipulation out of context. The true stipulation was worded as follows: "The parties agree that there is no constitutional question of equal protection of the laws and due process presented, the same having been disposed of in Defunis v. Odegaard, 82 Wn.2d 11" (Emphasis supplied; see Appendix G). This is not a true stipulation of any factual material and was never intended by the litigants to be such. The stipulation in its terms purports to be a waiver of constitutional arguments on both sides of

this question and the respondents herein at no stage of these proceedings have ever ceased to raise constitutional issues involving equal protection and due process. Neither has petitioner waived his right to his full constitutional protection. Moreover, the parties to this action were not attempting to stipulate what the constitutional law of the United States shall be. The stipulation by its very terms merely acknowledges for purposes of the trial court's decision, the fact of life in this jurisdiction that we are a DeFunis state. 82 Wn.2d 11, 507 P.2d 1169 (1973). Nothing more was intended nor did the trial court consider the stipulation to go beyond this basic acknowledgment. In fact, the trial court's decision itself clearly shows that the constitutional implications of this case were primary considerations in

reaching his decision where in his order he ruled:

> The court concluded from the records and files and argument that:
>
> 1. Under Amendment 14 of the United States Constitution and § VII of the Civil Rights Act of 1964, as amended (42 USCA §§ 2000e, et seq.), and Executive Order 11246, as amended, the City of Seattle has a legal duty to take affirmative action to eliminate the effects of past racial discrimination in the City employees selection processes and to prevent such racial discrimination from occurring in the future.

In any event, our Washington State Supreme Court did, in fact, reach the constitutional issue and thus the language indicating a waiver of constitutional rights by petitioner is purely dicta in the Washington Supreme Court decision. Therefore, the constitutional issue is appropriately before this court for review.

REASONS WHY WRIT SHOULD BE GRANTED

This case presents to the court a clear instance where a preference was granted to a minority employee and a right denied another not of a minority race where no specific discrimination had actually been proven to occur. Therefore, this case is truly a case of reverse discrimination. The uncertainty of the law in this area legitimately calls for national clarification by this court. The opinion of the Washington State Supreme Court below assumed that the City of Seattle was guilty of such discrimination as would require petitioner to suffer on behalf of a greater good when, in fact, no such discrimination was either admitted by the City nor proven by any party litigant. The Supreme Court said:

> That the City's selection process through the Civil Service Examinations administered in the past have discriminated against minority applicants is borne out by the record and statistical information.

(See Appendix A-8)

In fact, however, the only evidence the Supreme Court had to consider was the City's statement contained in their stipulation of facts:

> 8. That Seattle's Civil Service Tests have had the effect in some cases of discriminating against minority applicants among those deemed eligible for appointment in accordance with provisions of Charter Article XVI, Section 9, as determined by the results of those examinations; and said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and, therefore, have little or no chance of being employed.

See Appendix A-46. Thus the City in effect denies that there has been a general condition of discrimination throughout the Civil Service Examination process, and in addition, refuses to acknowledge that there has been any specific discrimination either in the department in which petitioner works or any discrimination against Ponce, the minority applicant, individually. Thus, the City has not been proven to have discriminatory hiring

patterns in practice; such was required by Franks v. Bowman Transportation Company, 44 L.W. 4356, 4363 (1976). In the absence of evidence of a specific discriminatory hiring policy, the court, therefore, approved an affirmative action program that was inappropriate under the circumstances and violative of the constitutional rights of petitioner. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The Supreme Court has stated that reverse discrimination is illegal under the Civil Rights Act of 1964:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress had proscribed.

Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

When actually attempted, reverse discrimination has been ruled illegal.

Weber v. Kaiser Aluminum, 45 L.W. 2018 (U.S.D.C. E.La., 19__); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal., 1972); Fraternal Order of Police v. City of Dayton, 35 Ohio App. 2d 196, 301 N.E.2d 269 (1973); Jackson v. Poston, 40 A.D.2d 19, 337 N.Y.S. 2d 108 (1972).

Civil Service Rule 7.03j attempts by preferential treatment to the "highest ranking" eligibles of the particular race, creed, color, national origin or sex or the "highest ranking" handicapped eligibles to bring all minorities into a desirable ratio with the Seattle Community. The noble effort, however, makes shambles of the City Charter Provision, Article 16, Section 9, and is an inappropriate response to non-specific disparate discrimination as was established in the case by the evidence. Title VII permits the court to order such "affirmative

action" as may be appropriate in order to remedy intentional discrimination (42 U.S.C. § 2000e 5(G)). However, it does not mandate, nor does the 14th Amendment of the United States Constitution require, the reverse discrimination preferences as required by Civil Service Rule 7.03j.

The Supreme Court opinion is very candid in its reasoning, wherein it equates the preference granted Mr. Ponce in this case to a veterans' preference in public employment and the overtime parking privilege offered the physically handicapped (See Appendix A-12, 13). However, a preference based on military service or physical infirmity is not relevant to a discussion of preferences based on race. Racial preferences have no constitutional basis for their justification and have been found violative of the equal protection clause of the 14th Amendment. Brown v. Board of Education, 347 U.S. 483 (1954).

This case presents issues which should be decided by this court. The federal questions involved are extremely important because they totally destroy the merit concept of Civil Service employment in municipal government and affect a substantial body of the public.

Respectfully submitted,

CHARLES R. LONERGAN,JR.
PATRICK W. CROWLEY

Counsel for Petitioner

APPENDIX A

[No. 43750. En Banc.

MICHAEL E. LINDSAY, ET AL, Plaintiffs, WESLEY BRABANT, Appellant, v. THE CITY OF SEATTLE, ET AL, Respondents.

[1] Civil Rights - Public Employment - Discrimination - Determination. A court may determine whether public employment practices violate the equal protection rights of minority applicants by applying the test imposed by title 7 of the Civil Rights Act of 1964, i.e., whether they deprive or tend to deprive such persons of employment opportunities or adversely affect their status as employees on the basis of race or national origin. Discrimination may be inferred from statistics which demonstrate a substantially disproportionate level of minority representation in public employment.

[2] Civil Rights - Affirmative Action - Necessity - Public Employment. Title 7 of the Civil Rights Act of 1964 mandates an affirmative action program for persons of minority background in public employment when necessary to eliminate the continuing effects of past discrimination, whether or not current practices are discriminatory. The need and justification for affirmative action are eliminated when minority representation in public employment fairly approximates minority representation in the population of the area; statistical perfection is not required.

[3] Civil Service - Discrimination - Federal Supremacy - Local Laws. Under the supremacy clause (U.S. Const. art. 6, cl. 2), federal legislation relating to discrimination in public employment is controlling over conflicting state or local enactments relating to selection of public employees.

[4] Appeal and Error - Review - Issues Not Raised in Trial Court - In General. An appellate court will not pass upon issues which were not presented to the trial court.

[5] Administrative Law and Procedure - Delegation of Powers - Constitutional Requisites. A delegation of legislative power is constitutionally permissible when it provides standards which indicate what is to be done and the administrative body which is to do it, and there are procedural safeguards against arbitrary administrative action and abuse of discretionary power.

[6] Civil Rights - Affirmative Action - Public Employment - Use of Goals - Validity. The use of goals in implementing an affirmative action program in public employment is constitutionally permissible. A goal, unlike an absolute quote or preference, is a realistic numerical objective which is based on expected job vacancies and qualified applicants available and which does not require displacement of existing employees, creation of unneeded positions, or the hiring of unqualified persons.

[7] Administrative Law and Procedure - Administrative Rules - Validity - Determination. Rules adopted by an administrative agency pursuant to a specific legislative delegation of such authority are presumed to be valid; a person who asserts their invalidity has the burden of proving that the agency abused its discretion in adopting the rules in question.

Appeal from judgment of the Superior Court for King County, No. 757364, Solie M. Ringold, J., entered October 5, 1973. Affirmed.

Action challenging a civil service affirmative action program. One of the plaintiffs appeals from a summary judgment in favor of the defendants.

C. R. Lonergan, Jr. (of Siderius, Lonergan & Crowley), for appellant.

John P. Harris, Corporation Counsel, and Gordon F. Crandall, Assistant, for respondents City of Seattle, et al.

James E. Fearn, Jr., and Peter Greenfield of Legal Services Center (Seattle), for respondents Green, et al.

This opinion was prepared by Justice Robert C. Finley before his death. It is adopted by the undersigned Justices as the opinion of this Court.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs,	)	
WESLEY BRABANT, Appellant, v.	)	No. 43750 EN BANC
THE CITY OF SEATTLE; ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Respondents,	)	
ROBERT L. GREEN; and UNITED CONSTRUCTION WORKERS ASSOCIATION, Respondents,	)	
EMELIANO PONCE, Respondent.	)	Filed Apr 8 1976

The central issue raised in this case is whether the City of Seattle may adopt a system or program for the employment of civil service workers that gives special employment preference or priority as to jobs to certain qualified individuals solely because they are members of minority groups.

Wesley Brabant, a civil service employee with the City of Seattle, was passed over for possible promotion to a foreman's position in the engineering department. Instead, Emeliano Ponce, a Spanish surnamed minority eligible, was chosen to fill the vacancy to further the

goals of the City's "affirmative action program," which was designed to correct preexisting discrimination and to equalize employment opportunities in the City's civil service. Brabant brought suit against the City, alleging his entitlement to promotion to the position which had been given to Emeliano Ponce. The trial court granted defendant's motion for a summary judgment and Brabant has appealed.

Brabant contends the trial court erred in denying him relief because (1) selective certification under Rule 7.03(j), Seattle Civil Service Laws and Rules, violates the express provisions of article 16, section 9, of the City charter; (2) the selective certification violates the fourteenth amendment to the United States Constitution and Const. art. 1, sec. 3; (3) the Commission lacks the authority to delegate to its secretary the discretionary power to certify eligible candidates for appointment; and (4) the City's affirmative action program goes beyond existing federal or state requirements. We disagree and affirm the trial court.

The parties have agreed and stipulated as to the facts, which we recap as follows: On August 25, 1972, the Mayor of Seattle issued an executive order establishing an affirmative action program. The goal of the program was "to increase the number of underrepresented persons employed by the City to correspond with their statistical composition within the available working force of the population" of Seattle. The City passed an ordinance, approved by the Mayor on October 27, 1972, that provided for implementation of the affirmative action program "to achieve equality of City employment opportunities for members of minority races. Under the ordinance, all City departments were required to estabish and maintain effective affirmative action programs until the effects of inequality of employment opportunities were eliminated. The Seattle engineering department, on June 21, 1972, promulgated a departmental policy statement that established as the goal of

that department the achievement of ratios of minority employment "comparable to the ratios of . . . minorities in the Seattle Community." The department adopted as an emergency measure during the years 1972-74 a rule that "the first of every three vacancies resulting from retirement or termination in under-represented classes will be filled with appropriate minorities."

Article 16, section 9, of the Seattle City Charter established the method by which the Civil Service Commission shall certify available eligible candidates to a department head for possible employment by the City. Specifically, it provides that, if the head of a department notifies the Commission of a vacancy in an office classified under article 16, the Commission is required to certify to the appointing authority the top five eligible candidates who have successfully passed the civil service examination and are available. In the alternative, the Commission is required to certify the top 25 percent of the available and eligible candidates on the register if that number is more than the top five.

As a result of the emphasis placed on affirmative action in public employment and the City's awareness that its employee selection procedures had discriminated against minorities, the Commission adopted a special certification procedure to further the goals of affirmative action. Rule 7.03(j) allows selective certification of "only the highest ranking eligibles" of a particular minority when necessary to implement the affirmative action program. A selective certification of a minority eligible must be requested by the department head, approved by the secretary of the Commission, and by the director of the City's Department of Human Rights.

The plaintiff Brabant, a nonminority eligible, took the City's civil service examination for the position of signal electrician foreman in 1969 and was placed on the promotional register of eligibles fourth from the top with a grade of

88.58. In 1970, Brabant was appointed to an intermittent vacancy in the engineering department to serve as relief foreman when a regular foreman was on vacation or sick leave.

Emeliano Ponce, a minority applicant, also took and passed the promotional examination in 1969 and was placed on the register of eligibles eighth from the top with a grade of 81.83. In 1972, he also was appointed to an intermittent vacancy in the engineering department to serve as a relief foreman.

On January 31, 1973, the engineering department requested a selective certification to fill a vacancy of signal electrician foreman. The request for selective certification was approved, and Ponce, who was not among the top five on the eligible register at the time, was appointed by the engineering department to fill the vacancy on March 1, 1973.

The City is an "employer" under Title 7 of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e, et seq., and is subject to its provisions. Section 2000e-2(a)(2) of the act provides that it is an unlawful employment practice for an employer to

> limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-5(g) authorizes courts to "order such affirmative action as may be appropriate" to remedy the effects of unlawful employment practices. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974).

Congress enacted Title 7 of the Civil Rights

Act of 1964

> to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971). Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.

Alexander v. Gardner-Denver Co., supra at 44. Accord: Associated General Contractors of Mass., Inc., v. Altshuler, 490 F.2d 9, 15 (1st Cir. 1973) cert. denied, 416 U.S. 957, ___ L. Ed. 2d ___, 94 S. Ct. 1971 (1974).

The City voluntarily has established a program of affirmative relief and, in an effort to comply with Title 7, has chosen selective certification of qualified minority applicants as the most efficacious means to eradicate the effects of past discriminatory practices in its employee selection procedure.

That the City's selection processes through the civil service examinations administered in the past have discriminated against minority applicants is borne out by the record and statistical information.

By affidavit dated September 7, 1973, Thomas F. Hanley, secretary of the Civil Service Commission, stated that the Equal Employment Opportunity Commission has formally charged the City with unlawful employment practices in violation of Title 7 of the 1964 Civil Rights Act, arising in part because it "'administers unvalidated tests which have the effect of eliminating a disproportionate number'" of minority persons. The formal charge attached to the Hanley affidavit also indicates that the City has maintained a seniority system which operates to perpetuate the effects of

past discriminatory practices and procedures. The affidavit further indicates that it will take the City several years to validate all examinations given for positions by the City's civil service department i.e., to determine whether the examinations are designed to measure reliably an individual's ability or capacity to perform a particular job.

On October 20, 1971, the Civil Service Commission, in conjunction with Rule 7.03(j), Seattle Civil Service Laws and Rules, adopted a resolution that the

> civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment . . . [and that the] results [of the examinations] tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore have little or no chance of being employed.

The parties stipulated to the factual assertions stated in the Civil Service Commission's resolution.

By affidavit dated June 28, 1973, Philip Hayasaka, the City's director of the Department of Human Rights, stated that in 1969 the City had 10,294 employees, 780 or 7.6 percent of whom were members of minority races. The 1970 census, according to the affidavit, indicated that of the 530,831 persons living in the City, 77,796 or 14.7 percent were minorities. The affiant stated that the following statistics (compiled by the Department in 1972) were considered by the Department of Human Rights prior to its approval of the use of selective certification in the instant case: (1) of the three signal electrician foremen in the engineering department, no one was of a minority; (2) of the fifty foremen in th engineering department, three or 6 percent were minorities; (3) of the 136 unskilled laborers in the

engineering department, fifty or 36.7 percent were minorities; and (4) of the 10,630 persons employed by the City, 1,359 or 12.7 percent were minorities.

The statistical information in the record indicates that the employee selection procedures used by the City had, over a period of years, created a substantially disproportionate level of minority representation in public employment. The statistical evidence raises an inference that the racial imbalance is a result of discriminatory examinations and practices. A prima facie case of discrimination based on such evidence is established. Rogers v. International Paper Co., 510 F.2d 1340, 1348 (8th Cir. 1975); United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871, 875 (6th Cir. 1974); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 55 (5th Cir. 1974); Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950, 32 L. Ed. 2d 338, 92 S. Ct. 2045 (1972).

The test of the validity of employee selection procedures under Title 7 is comparable to the test of their validity over the long run under the Fourteenth Amendment. United States v. Chesterfield County School Dist., 484 F.2d 70, 73 (4th Cir. 1973); see Castro v. Beecher, 459 F.2d 725, 733 (1st Cir. 1972). The test statutorily is defined in 42 U.S.C. sec. 2000e-2(a)(2) which proscribes classification of employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . or national origin." Thus, in the past, the City's prior discriminatory examinations and employee selection procedures have violated the constitutional rights of minority applicants. When state or local officials have deprived a class of individuals of their rights guaranteed by the

equal protection clause of the Fourteenth Amendment, the federal courts have

> not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Louisiana v. United States, 380 U.S. 145, 154, 13 L. Ed. 2d 709, 85 S. Ct. 817 (1965); accord, NAACP v. Allen, 493 F.2d 614, 617, (5th Cir. 1974); Carter v. Gallagher, supra at 328.

In Griggs v. Duke Power Co., 401 U.S. 424, 430, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971), the United States Supreme Court stated:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The effects of past discrimination tend to perpetuate themselves because the resulting inequalities made new employment opportunities less accessible to minorities. Associated Gen. Contractors of Mass., Inc. v. Altshuler, supra at 16; see DeFunis v. Odegaard, 82 Wn.2d 11, 36, 507 P.2d 1169 (1973). Under Title 7, the obligation not to discriminate does not allow indifference to employment procedures outwardly neutral but racially oriented. Opinion of the Attorney General, 115 Cong. Rec. 40024 (1969).

Section 2000e-5(g) of the act vests in the trial court broad equitable powers both to eliminate the vestiges of past discrimination and to terminate present discriminatory practices. United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971), cert. denied 404 U.S. 984, 30 L. Ed. 2d 367, 92 S. Ct. 447 (1971). Transitional affirmative relief authorized by

section 2000e-5(g) of the act to insure that the continuing effects of past discrimination are overcome not infrequently is both appropriate and necessary. NAACP v. Allen, supra at 621; Morrow v. Crisler, 491 F.2d 1053, 1056 (1974); Carter v. Gallagher, supra at 330-31; Castro v. Beecher, supra at 736. The fact that the City voluntarily has sought to achieve equality of employment opportunity in the public sphere rather than by court order does not detract from or lessen the legal validity and necessity of its affirmative action program under Title 7. Voluntary compliance, rather than court ordered relief, is the congressionally preferred method of achieving equality of employment opportunity.

Selective certification coupled with the engineering department's policy of filling the first of every three vacancies with a qualified minority candidate is not only appropriate, but also essential to eradicate in the instant case the present effects of past discrimination. Cf. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 319, 320 (5th Cir. 1975). It is not enough that employment procedures utilized by employers are fair in form. They must be fair in operation. See Griggs v. Duke Power Co., supra at 431.

The ethics of our society would judge people on their ability and their individualized worth. But past discriminatory practices incongruent with those same ethics and with the abstract, idealistic perfection of a color-blind society, envisioned by the Fourteenth Amendment, have left minorities to varying degrees educationally and economically disadvantaged.

It may seem somewhat anomalous, at first glance, to aspire to equality by resorting to preference or devices premised upon inequality, namely relief in the form of temporary quotas. Preferences are not alien to this society. It has long been recognized that the need or merit of certain individuals provides a politically and

economically justifiable basis for preferential treatment. Kaplan, Equal Justice in an Unequal World: Equality for the Negro--The Problem of Special Treatment, 61 Nw. U.L. Rev. 363, 364-65 (1966). For example, veterans are given preference in public employment; the handicapped, quite deservedly, are accorded many advantages, even to the extent of granting overtime parking privileges to some. RCW 46.61.580.

The thorny problem created by the use of temporary quota relief is that this type of preferential treatment may tend to become permanently institutionalized. Those minorities who benefit may only reluctantly give up the economic advantage that local, state and federal governments have given them. Nevertheless, the basis and rationale for affirmative relief will disappear when the vestiges of past discriminatory effects substantially are eliminated. Morrow v. Crisler, 479 F.2d 960, 971 (5th Cir. 1973)(dissenting opinion); Blumrosen, Quotas, Common Sense, and Law In Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675, 692 (1974); see Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 31-32, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971); NAACP v. Allen, supra at 621; Carter v. Gallagher, supra at 330. Affirmative relief is designed to eliminate discrimination, but statistical perfection is not required. Once a fair approximation of minority representation in city employment consistent with the population mix in the arEa is achieved, affirmative relief is no longer necessary or appropriate. See Swann v. Charlotte-Mecklenburg Board of Educ., supra at 31-32; Carter v. Gallagher, supra at 330.

In the absence of Rule 7.03(j)(Seattle Civil Service Laws and Rules), article 16, section 9 of the City charter would impair or frustrate the purpose of Title 7 of the 1964 Civil Rights Act. The examinations used by the City to rank applicants for certification, as reflected by the record, have created in the past a substantial

racial imbalance. There is no reason to suppose that these same examinations, until validated or shown to be job-related, will not continue to perpetuate discrimination in the City's public employment sector. State and local laws cannot stand if they impede, burden or frustrate the purpose of Title 7. See Nash v. Florida Indus. Comm'n, 389 U.S. 235, 240, 19 L. Ed. 2d 438, 88 S. Ct. 362 (1967); Hsieh v. Civil Serv. Comm'n, 79 Wn.2d 529, 536, 488 P.2d 515 (1971). If it were not for the presence of Rule 7.03(j), article 16, section 9 of the City charter would violate the supremacy clause of the United States Constitution (U.S. Const. art. 6, clause 2). We hold that the conflict between article 16, section 9 of the City charter and Rule 7.03(j) of the Seattle Civil Service Laws and Rules is excused because of the overriding provisions of Title 7 of the Civil Rights Act of 1964.

Plaintiff next contends that the selective certification made in the instant case is violative of equal protection and due proces guarantees. This contention need not be considered. Although the trial court in a judgment entitled "Summary Judgment of Dismissal" stated that under the Fourteenth Amendment the "City of Seattle has a legal duty to take affirmative action," the parties submitted an agreed statement of stipulated facts and issues of law to the trial court in which they agreed that "there is no constitutional question of equal protection of the laws and due process presented." It is apparent that the trial court did not consider the issue whether selective certification in the instant case violates the Fourteenth Amendment to the United States Constitution and article 1, section 3 of the Washington State Constitution. Under familiar principles of law, issues not considered by the trial court need not be considered on appeal.

Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), cited by plaintiff, is distinguishable even if we were to address the issue raised by this

contention. There the court reversed a district court order which required the imposition of promotion quotas based upon the results of one civil service examination. The court concluded that the imposition of permanent quotas to eradicate the effects of past discriminatory practices was unwarranted because of the "paucity of the proof concerning past discrimination." We are not faced with that situation in the instant case.

Plaintiff next contends that the Commission lacks the authority to delegate to the secretary the discretionary power vested in it by article 16, section 9 of the City charter to certify eligible candidates for appointment. In Barry & Barry, Inc. v. Department of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), the court held that the delegation of legislative power is justified (1) when it can be shown that the legislature has provided standards which define in general terms what is to be done and the administrative body which is to accomplish it, and (2) when procedural safeguards exist to control arbitrary administrative action and abuse of discretionary power.

Article 16, section 4 of the City charter provides that the Commission shall make "rules to carry out the purposes of this article, and for examinations, appointments, promotions, . . . and for seniority, transfers, demotions and removals." Article 16, section 15, provides that the secretary is to be the chief examiner and is to "perform such other duties as the Commissin may prescribe." Rule 7.03(c)(1) of the Seattle Civil Service Laws and Rules provides:

> If a vacancy is to be filled from a promotional register, the Secretary shall certify to the appointing authority the names of the five available eligibles or 25% of the total available eligibles, whichever is greater, who stand highest on the appropriate register . . .

In order to make a selective certification under Rule 7.03(j), a request in writing must be made by the appointing authority to the secretary that selective certification is necessary in order to implement the affirmative action program; and the secretary must determine that the reasons given fully justify the request. Rule 2.05(a) provides that the Commission may on its own motion review or modify any action or decision of the secretary. Rule 2.05(b) also provides that any person adversely affected by any action or decision of the secretary may request the Commission to revise or modify such action or decision. These standards or guidelines carefully define what is to be done by the secretary and that he is vested with the obligation to make the certifications. Finally, procedural safeguards exist which allow either the Commission or the individual adversely affected by the secretary's action to review or to request a hearing by the Commission to revise or modify any action or decision. We are convinced that the conditions outlined in the Barry case are met in the instant case and that the challenged delegation of legislative power is valid.

Plaintiff finally contends that the City's affirmative action program is overly broad under existing federal or state requirements. It is contended that a joint policy statement issued by the Equal Employment Opportunity Commission, and the Department of Labor's Office of Federal Contract Compliance does not allow an affirmative action program to subordinate

> considerations of relative abilities and qualifications . . . to considerations of race, religion, sex or national origin in determining who is to be hired, . . . in order to achieve a certain numerical position [because such a program] has the attributes of a quota system which is deemed to be impermissible under the standards set forth.

Joint Policy Statement, March 23, 1973.

The policy statement specifically recognizes that "goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities through affirmative action programs." A goal is defined to be a realistic numerical objective fixed in relation to the number of expected vacancies and the number of qualified applicants available in the relevant labor pool. A goal, as opposed to an absolute quota or preference, does not subject an employer to sanction. An employer is not expected to displace existing employees or to create unneeded positions to meet his goal. An employer is never required to hire an unqualified applicant. None of the characteristics of an absolute quota or preference is present in the instant case. See Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341, 378; Comment, Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1301 (1971); cf. Opinion of the Attorney General, 115 Cong. Rec. 44024 (1969); see also Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 102-06 (1972). In fact, several courts have required affirmative hiring relief by public agencies that have engaged in employment practices which have been shown to have a racially discriminatory impact. See, e.g., Morrow v. Crisler, 421 F.2d 1053 (5th Cir. 1974); Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950, 32 L. Ed.2d 338, 92 S. Ct. 2045 (1972).

With respect to state guidelines, WAC

162-18-040(2)[1] specifically recognizes that selective certification may be the only effective method for a public employer to implement an affirmative action program. Where the legislature specifically delegates to an administrative agency the power to make rules, there is a presumtpion that such rules are valid, and the burden is upon the person asserting the invalidity to prove that the administrative agency abused its discretion in adopting the rule. Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310, 314, ___ p.2d ___ (1976). Plaintiff provides no evidence to support his contention, and we find that it lacks merit.

The judgment of the trial court should be affirmed. It is so ordered.

WE CONCUR:

[1] WAC 162-18-040(2) provides, in part:
"The purpose of a corrective employment program is to include persons of the underrepresented protected class into the employment process; not to exclude others from it. . . . It is permissible to ask for applications of only the underrepresented protected class of persons from a particular source, or at a particular time, if other applicants are not excluded from the total hiring process but have access from another source, or are considered at another time."

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs,	)	
WESLEY BRABANT, Plaintiff in Intervention,	)	NO. 757 364 SUMMARY JUDGMENT OF DISMISSAL
vs.	)	Copy Received Oct. 1, 1973 Siderius, Lonergan & Crowley
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants,	)	Received Oct. 1, 1973 Legal Services Center Central Area Office
ROBERT L. GREEN and UNITED CONSTRUCTION WORKERS ASSOCIATION, Defendants in Intervention,	)	
EMILIANO PONCE, Additional Defendant.	)	

THIS MATTER came on before the undersigned Judge for hearing on the motions for summary judgment of plaintiff in intervention (13)* and of defendants (36) on September 10, 1973.

* Clerk's sub-number

The complaint of the original plaintiffs (1) was filed on or about September 25, 1972, alleging that their rights to City employment or promotion had been violated by the failure of the City and its Civil Service Commission to certify eligibles for vacancies in accordance with the procedure provided in Article XVI, Section 9 of the Charter of The City of Seattle. Defendants filed their answer (6) on December 19, 1972 denying the essential allegations of the complaint. Thereafter all of the original plaintiffs were employed or promoted by the City, rendering their complaint moot, and the action was dismissed as to them on March 15, 1973 (12). However, plaintiff in intervention's (Brabant) motion to intervene (8) was granted by agreement (9) and his complaint in intervention (10) was filed on or about March 14, 1973, alleging that his rights were violated by the Civil Service Commission's action in refusing to certify his name for a vacancy of Signal Electrician Foreman and in certifying only one name, that of Emiliano Ponce, to the appointing authority for the position. The certification of only Ponce's name to the appointing authority, even though he ranked below plaintiff in intervention on the eligible register, was done pursuant to a policy of "selective certification" because Ponce was a member of an underrepresented minority race.

Defendants in intervention were allowed to intervene (21) in the matter by agreement of all parties pursuant to motion (17), supported by an answer in intervention (19) and the affidavit of Harley Bird alleging the interest of Robert L. Green in possible city employment through selective certification.

Plaintiff moved for summary judgment (13) and noted it for the Motion Calendar for July 29, 1973 (14). The matter was continued by the Court to September 10, 1973, and several pretrial conferences were held to establish the facts of the case by affidavit or agreement,

and to define and narrow the issues to be resolved. Emiliano Ponce was ordered named as an additional defendant (25) and served with Summons and complaint. On August 10, 1973 Mr. Ponce filed an acknowledgment of service and a declaration of his intention not to employ an attorney in the case (28).

On September 10, 1973 the parties submitted an agreed Statement of Stipulated Facts and Issues of Law to the Court (34). The City also filed its motion for summary judgment (36)at the prior suggestion of the Court, and plaintiff and defendants in intervention orally waived the lack of timeliness of said motion. The Court then heard argument of counsel, and in addition to the foregoing considered the following papers filed in the case:

Document Title	Clerk's Subnumber
Complaint in Intervention	10
Answer (of City defendants)	6
Answer in Intervention	19
Affidavit of Wesley Brabant in Support of his Motion for Summary Judgment	11
Affidavit of Thomas F. Hanley	15
Affidavit of Philip Y. Hayasaka	16
Affidavit of Harley Bird	19
Affidavit of C. R. Lonergan, Jr.	23
Affidavit of John F. Fenton	31
Affidavit of Thomas F. Hanley	29

Document Title (Cont'd)	Clerk's Subnumber
Affidavit of Thomas F. Hanley	32
Third Affidavit of Thomas F. Hanley	33
Statement of Stipulated Facts and Issues of Law	34
Brief in Support of Motion [of UCWA and Green] to Intervene	18
City's First Brief on Summary Judgment	22
Memorandum on Motion of Plaintiff for Summary Judgment	24
Memorandum on Motion for Plaintiff Summary Judgment by Defendant in Intervention	27
City's Second Brief on Summary Judgment	30
Memorandum of Plaintiff in Intervention in Answer to Defendant City, etc.	35
Charter of the City of Seattle	--

The Court concluded from the records and files and arguments that:

1. Under Amendment 14 of the United States Constitution and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C.A. secs. 2000(e) et seq.), and Executive Order 11246, as amended, The City of Seattle has a legal duty to take affirmative action to eliminate the effects of past racial discrimination in City employee selection processes and to prevent such racial discrimination from occurring in the future.

2. While Civil Service Commission Rule 7.03j is in apparent conflict with Article XVI, Section 9 of the Charter of The City of Seattle,

said conflict is excused by the overriding provisions of federal law referred to in the preceding paragraph.

3. Rule 7.03j does not constitute an illegal delegation of discretionary authority from the Civil Service Commission to its Secretary.

4. That portion of the affirmative action program of the Engineering Department by which the first of every three vacancies created by retirement or resignation will be filled with a minority application who has passed the required civil service examination does not constitute the adoption of a quota system, but is rather a tool to accomplish the legitimate goals of said program within the timetable established to reach such goals.

5. Selective certification is lawful in connection with promotional eligible registers because the opportunities for minorities on promotional registers are probably even more limited than on open competitive eligible registers.

6. The existence of other methods of taking affirmative action to eliminate the effects of past and present discrimination does not preclude the use of selective certification.

7. The fact that the duty to take affirmative action was recognized voluntarily by The City of Seattle, rather than being imposed by judicial mandate, is immaterial.

8. The elimination of the effects of past and present discrimination is a legitimate public purpose, and selective certification is a reasonable and effective means of accomplishing such purpose.

9. The City of Seattle has satisfied the burden of showing the necessity for taking

affirmative action to eiminate the effects of past and present discrimination in its employees selection processes; and a showing that the City's civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment in accordance with provisions of charter Article XVI, Section 9, as determined by the results of those examinations, and that said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore to have little or no chance of being employed, is sufficient in such connection.

Now, Therefore, it is

ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary judgment be, and it is hereby denied; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment of dismissal be, and it is hereby, granted, and the complaint is hereby dismissed with prejudice and without costs to any party.

DONE IN OPEN COURT this 5 day of October, 1973.

/s/ Ringold
JUDGE

Presented by:

GORDON F. CRANDALL
GORDON F. CRANDALL
Of Counsel for Defendants

Copy received, approved
as to form:

_____
_____
_____

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs,	]	
WESLEY BRABANT, Plaintiff in Intervention,	]	NO. 757 364 COMPLAINT IN INTERVENTION
vs.	]	Copy Received Mar. 15, 1973 A.L. Newbould, Corporation Counsel
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants,	]	Filed '73 Mar 19 PM 3:46

COMES NOW the plaintiff and for cause of action alleges as follows:

I.

Plaintiff is a resident of Seattle, King County, Washington.

II.

In response to advertisements issued by the defendant announcing a "promotional" examination for the Civil Service position of signal electrician foreman, plaintiff applied for and took the examination. A copy of said announcement is attached hereto., marked Exhibit "A", and incorporated herein by reference.

III.

Thereafter plaintiff was notified that he had passed the examination and his name was placed upon the eligible register for signal electrician foremen.

IV.

Section 8, Article XVI, Seattle City Charter, requires the defendants to rank candidates who pass Civil Service examinations upon eligible registers for the position examined for, in the order of their excellence, as determined in said examinations.

V.

At all times herein, Article XVI, Section 9, of the City Charter of the City of Seattle, provides in part as follows:

> ". . . number of candidates, not less than five if there shall be so many eligible, standing first upon the register for the class or grade to which such position belongs as shall be equal to twenty-five percent of the total number of candidates on said register."

VI.

The defendants, in violation of the provisions of the City Charter as referred to above, did on or about March 1st purport to certify an individual for the position of signal electician foreman the name of Ponce, whose true Christian name is unknown to plaintiff. The defendants refused to certify plaintiff's name although plaintiff ranked second on the list at the time of said certification. Said Ponce ranked last on said eligible register, and the defendants refused to certify any other names than said Ponce's for consideration for the appointment to the position.

VII.

Plaintiff spent considerable time preparing for said examination and defendants' action in refusing to certify his name was wholly beyond defendants' authority and in violation of the Constitution of the State of Washington and the United States of America in that it discriminated against plaintiff, and further, that actions of said defendants are in violation of the City Charter and the authority confered upon the Civil Service Commissioners of the City of Seattle, and that said actions of the defendants should be nullified and enjoined and the defendants should be required to nullify the appointment of said Ponce made in violation of said provisions.

WHEREFORE, plaintiff prays for judgment, declaring the actions of the defendants hereinbefore referred to to be wholly illegal and of no effect whatsoever, and that the defendants be enjoined from certifying any employees appointed to positions in the Civil Service of the City of Seattle except in the manner prescribed by Article XVI, Section 9, of the City Charter; and that the defendants be required to make proper certification for the position of signal electrician foreman, and for such other further relief as the Court may deem equitable in the premises.

/s/ C.R. Lonergan, Jr.
C.R. Lonergan, Jr.

STATE OF WASHINGTON]
] ss.
County of King]

WESLEY BRABANT, being first duly sworn, upon oath deposes and states: I am the plaintiff in intervention in the foregoing cause; I have read the above complaint, know the contents thereof and believe the same to be true.

/s/ Wesley M. Brabant
Wesley Brabant

SUBSCRIBED AND SWORN TO before me this 9th day of March, 1973.

/s/ Helsie I. O'Brien
NOTARY PUBLIC in and for the State of Washington, residing at Seattle

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs, vs. CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants,	NO. 757 364 ANSWER Copy Received Dec. 19, 1972 Siderius, Lonergan & Crowley Filed '72 Dec 19 PM 4:52

Comes now defendants and for their answer the the Complaint, admit, deny and allege as follows:

I.

Defendants admit Paragraph I.

II.

Defendants admit Paragraph II, except the allegation regarding reliance of which defendants lack sufficient knowledge to form a belief and therefore deny the same.

III.

Defendants admit Paragraph III.

IV.

Defendants admit Paragraph IV.

V.

Defendants admit Paragraph V.

VI.

Defendants admit Paragraph VI except the allegation that the acts alleged violate the City Charter, which is denied.

VII.

Defendants deny Paragraph VII.

VIII.

Defendants deny Paragraph VIII.

IX.

DEFENDANTS ALLEGE AFFIRMATIVELY that on October 2, 1971 the Civil Service Commission of the City of Seattle adopted the following resolution:

> "Whereas, civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed to be eligible for appointment in accordance with provisions of Charter Article XVI, Section 9, as determined by the results of those examinations, and;
>
> "Whereas, said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore to have little or no chance of being employed, and;
>
> "Whereas, said results deny these same minorities the equal protection of the laws guaranteed to all persons by the 14th Amendment to the Constitution of the United States;

> "Be It Resolved that Rule 7.03 Certification be amended by adopting a new section j."
>
> "j. Where a certification of eligibles other than in the normal order is requested in writing by the appointing authority as being necessary to implement the Affirmative Action Program of the City of Seattle by achieving ratios of minority employees in all classifications of city employment approximately equal to the ratios of these same minorities in the Seattle community, and the Secretary determines that the reasons given fully justify the request, a certification may be made of only the highest ranking eligibles of the particular race, creed, color, national origin or sex designated in the request.

X.

That on August 25, 1972 the Mayor of The City of Seattle issued an executive order establishing an affirmative action program for city employment, which provided in part that -

> "The goals of this affirmative action program shall be to increase the number of underrepresented persons employed by the City to correspond with their statistical composition within the available working force of the population of The City of Seattle."

and ordered or requested each department of the City to -

> "Instruct all staff in hiring responsibilities that underrepresented persons are to be sought for appointments and that Civil Service selective certification procedures are available for use to this end."

XI.

That The City of Seattle is required by the federal Civil Rights Act of 1964, as amended, and by Executive Order 11246, as amended, to take reasonable, affirmative action to remove or overcome the consequences of prior discriminatory practices or usage in order to accomplish the purposes of said Act.

WHEREFORE, defendants pray that the complaint be dismissed with prejudice and with costs.

DATED this 18 day of December, 1972.

/s/ A. L. Newbould
A. L. NEWBOULD, Corporation Counsel

/s/ Gordon F. Crandall
GORDON F. CRANDALL, Assistant Attorneys for Defendants

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs,	
WESLEY BRABANT, Plaintiff in Intervention,	NO. 757 364
vs.	AFFIDAVIT OF THOMAS F. HANLEY
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants,	Filed '73 Jun 26 PM 4:56

STATE OF WASHINGTON)
) ss.
COUNTY OF K I N G)

THOMAS F. HANLEY, being first duly sworn, on oath deposes and says:

That he is the Secretary of the Civil Service Commission of The City of Seattle, and makes this affidavit from his own personal knowledge and information and is competent to testify hereto.

That on October 20, 1971, the Civil Service Commission of The City of Seattle adopted the following resolution:

"Whereas, civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed to be eligible for appointment in

accordance with provisions of Charter Article XVI, Section 9, as determined by the results of those examinations, and;

"Whereas, said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore to have little or no chance of being employed, and;

"Whereas, said results deny these same minorities the equal protection of the laws guaranteed to all persons by the 14th Amendment to the Constitution of the United States;

"Be it Resolved that Rule 7.03 Certification be amended by adopting a new section j.

"j. Where a certification of eligibles other than in the normal order is requested in writing by the appointing authority as being necessary to implement the Affirmative Action Program of the City of Seattle by achieving ratios of minority employees in all classifications of city employment approximately equal to the ratios of these same minorities in the Seattle community, and the Secretary determines that the reasons given fully justify the request, a certification may be made of only the highest ranking eligibles of the particular race, creed, color, national origin or sex designated in the request."

That on March 4, 1969, the Civil Service Commission advertised a promotional examination for Signal Electrician Foreman. Exhibit "A," attached, is the official advertisement of the examination.

Wesley M. Brabant (Brabant) filed an application, took and passed the exam, and was placed in

the promotional register of eligibles for that class in grade order, fourth from the top. A copy of the register is attached as Exhibit "B". On April 23, 1969, Brabant's name was certified to the Engineering Department in response to a request for the top five names to fill a vacancy. Another man, Joseph Sherman, was appointed. Brabant was subsequently appointed on April 1, 1970 to an intermittent vacancy in the Engineering Department to serve as relief foreman when regular foremen were on vacation or sick leave, and he has served in that position from time to time.

Emeliano Ponce (Ponce) also applied for, took and passed the promotional examination and was placed on the promotional register of eligibles for that class in grade order, eighth from the top. (See Exhibit "B"). On March 6, 1972, Ponce was also appointed to an intermittent vacancy in the Engineering Department to serve as relief foreman when regular foremen were on vacation or sick leave, and he has served in that position from time to time.

On January 31, 1973, the Engineering Department initiated a request to the Civil Service Commission for a selective certification of minority persons to fill onc vacancy of Signal Electrician Foreman. The request stated that the request was made "to assist in the furtherance of our Affirmative Action Program in this class. Rule 7.03 j. We have 3 Signal Electrician Foreman (sic) in the Department none of which are minority." The request for certification is attached as Exhibit "C". The request was routed through and approved by the Office of Management and Budget and the Human Rights Department, together with a "Request to Fill Position" (Exhibit "D"), and was received by the Civil Service Commission on February 2, 1973. The Commission certified the only minority name on the register of eligibles, which was Ponce. (See Exhibit "C"). On March 1, 1973 the Engineering Department appointed Ponce to the vacancy.

The Engineering Department now has four Signal Electrician Foreman positions, and there is one additional position of this class in the General Services Department, which is filled by Robert McCurdy, a minority person.

/s/ Thomas F. Hanley
THOMAS F. HANLEY

SUBSCRIBED AND SWORN to before me this 26th day of June, 1973.

/s/ T. W. Listow
Notary Public in and for the State of Washington, residing at Seattle.

COPY RECEIVED
June 26, 1973
Siderius, Lonergan & Crowley

APPENDIX F

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs,	)	
WESLEY BRABANT, Plaintiff in Intervention,	)	NO. 757 364 ANSWER IN INTERVENTION
vs.	)	Copy Received July 5, 1973 Siderius, Lonergan & Crowley
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants,	)	Copy of Within Received July 5, 1973 A. L. Newbould, Corporation Counsel
ROBERT L. GREEN and UNITED CONSTRUCTION WORKERS ASSOCIATION, Defendants in Intervention.	)	

COME NOW intervenors Robert L. Green and United Construction Workers Association (hereinafter U.C.W.A.) and as a defense for which intervention is sought allege as follows:

I.

Intervenors Green and U.C.W.A. incorporate by reference paragraphs I through XI of Defendants' Answer.

By Way of defense and for cross and counterclaim, Intervenors Green and U.C.W.A. allege

affirmatively that:

II.

U.C.W.A. is a non-profit association organized in June, 1970 for the purpose of promoting equal employment opportunities. On April 6, 1972, said association entered into an agreement with the Department of Lighting of Defendant City of Seattle (hereinafter referred to as "the Department) in which a commitment was made to institute a specified affirmative action program for the purpose of increasing the number of its minority employees. A true copy of the agreement is attached as Exhibit A.

III.

Pursuant to its agreement, a memorandum was issued by the Department setting forth its pledge, objectives and policy with regard to implementing the affirmative action plan. A true copy of its memorandum is attached as Exhibit B.

IV.

In its memorandum, it was recognized by the Department of Lighting that affirmative action was necessary "to correct the racial imbalance of the department work force."

V.

U.C.W.A. is informed and believes that the agreement and the memorandum implementing it are part of a larger program instituted by the defendants herein (as more particularly described in paragraphs IX through XI of their answer) to insure that artificial barriers are not created which have the effect of excluding members of minority groups from employment by the city.

VI.

As part of that program and in order to

fulfill its agreement with U.C.W.A., the defendants rely upon a process of "selectively certifying" for employment members of underrepresented groups who have taken and passed relevant civil service examinations, for placement in those departments when there is found to be a racially imbalanced work force. Provision for this procedure is set forth in paragraphs IX and X of defendants' answer.

VII.

U.C.W.A. has placed many members of minority groups, including its own members, in jobs, as a direct result of the agreement and affirmative action program of which it is a party and which is challenged herein.

VIII.

Intervenor Robert L. Green is a member of a minority group by virtue of his being a Black American. He is also a member of U.C.W.A.

IX.

As a result of the agreement between U.C.W.A. and the Department of Lighting of Defendant City of Seattle and the city's affirmative action plan, he was hired by said Department on a provisional basis in May of 1972. He took the relevant Civil Service Exam for his job in July of 1972. Except for a period in which he recuperated from an injury incurred on the job, he continued in the employ of the Department of Lighting until December 15, 1972 when he was laid off due to the phasing out of his job.

X.

Subsequent to his lay-off, intervenor Green's name was placed upon the eligible Civil Service Register for re-employment by the Department of Lighting.

XI.

Intervenor Green believes that he has been and will be benefited by the Defendants' affirmative action program which is challenged in this action.

XII.

The intervenors believe that so long as the defendants utilize Civil Service Examinations and conform to the requirements of Article XVI, section 9 of the City Charter, the employment of members of minority groups will be substantially prevented, resulting in a racially imbalanced work force. Failure to adopt the actions herein described and challenged will result in failure of defendants to satisfy the standards imposed by relevant laws which prohibit discrimination on the basis of race, creed, color, national origin and sex.

XIII.

The intervenors believe that this action constitutes an interference with their contractual relations with the defendants and that either a negotiated settlement or judgment herein will render impossible performance of the duties and obligations owed them under the agreement between U.C.W.A. and the City of Seattle.

XIV.

Intervenor Green believes that invalidation of the city's affirmative action program, as requested herein by the plaintiff will exclude him from employment with the city.

UPON THE ABOVE allegations, intervenors Green and U.C.W.A. cross and counterclaim as follows:

XV.

FOR A FIRST CLAIM, the intervenors seek to enforce their rights under a contract with the

named defendants to which they are a party and third party beneficiary.

XVI.

FOR A SECOND CLAIM, the intervenors seek to prevent the interference with their contractual relationship with the defendant that is the necessary product of this suit.

XVII.

FOR A THIRD CLAIM, the intervenors seek to enforce their rights under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et seq. which prohibits discrimination against members of a minority group on account of their race, color and national origin in their attempts to secure employment opportunities.

XIX.

FOR A FOURTH CLAIM, the intervenors seek to enforce their rights under the Civil Rights Act, 42 U.S.C. sec. 1981, namely "the same right . . . to make and enforce contracts, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."

XX.

FOR A FIFTH CLAIM, the intervenors seek to enforce their rights to the equal protection of the laws guaranteed by the Fourtheenth Amendment of the United States Constitution and Article I, section 12 of the Washington Constitution.

XXI.

FOR A SIXTH CLAIM, the intervenors seek to enforce their rights under the Civil Rights Act, 42 U.S.C. 1983, which prohibits the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States.

WHEREFORE, the defendants in intervention respectfully pray:

1. That the complaint of the plaintiff be dismissed with prejudice and with costs.

2. That an order be entered requiring, defendants City of Seattle, Munro, Haley and McGinty to specifically perform the terms and conditions of the agreement entered into by U.C.W.A. and the Department of Lighting of the City of Seattle.

3. That this court enter a judgment declaring this action to be in interference with the rights of intervenors under the agreement entered into by U.C.W.A. and the Department of Lighting and dismissing this action accordingly.

4. That an order be entered requiring defendants City of Seattle, Munro, Haley and McGinty to comply with the standards imposed by relevant laws cited herein which prohibit discrimination in employment on the basis of race, color, creed, national origin and sex.

Respectfully submitted,

/s/ James B. Fearn, Jr.
JAMES E. FEARN, JR.

/s/ Stephen M. Randels
STEPHEN M. RANDELS

Attorneys for Defendant Intervenors Green and U.C.W.A.

APPENDIX G

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON and DAVID L. DAY, Plaintiffs,	
WESLEY BRABANT, Plaintiff in Intervention,	NO. 757 364 ANSWER IN INTERVENTION
vs.	
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants,	
ROBERT L. GREEN and UNITED CONSTRUCTION WORKERS ASSOCIATION, Defendants in Intervention.	

The undersigned hereby stipulate to the following facts:

1. The City of Seattle is a city of the first class, governed by the Charter of The City of Seattle.

2. That the City of Seattle is an "employer" under Title VII of the Civil Rights Act of 1964, and subject to the duties of an employer fixed by that act to refrain from

engaging in racial discrimination in employment, and to take affirmative action to eliminate the effects of past discrimination.

3. That The City of Seattle is a contractor with the United States for millions of dollars of federal financial assistance and as such is obligated by Executive Order 11246, as amended, to take affirmative action to avoid and eliminate racial discriminatin in city employment.

4. That on August 25, 1973, the Mayor of Seattle issued his "Executive Order Establishing an Affirmative Action Program for City Employment," described therein as a "program to increase the number of employees of a particular race, age, color, national origin, or sex employed by the City in order to correct a condition of underrepresentation of such persons caused by present or past practices, customs or circumstances that have limited employment opportunities for members of the affected group." The goal of the affirmative action program was "to increase the number of underrepresented persons employed by the City to correspond with their statistical composition within the available working force of the population of the City of Seattle." The order called upon each City department head to "establish, administer and maintain an affirmative action program tailored to the particular set of circumstances applicable to that department and designed to carry out the principles and purposes of this executive order." In particular, each department was ordered to, among other things, ". . . (c) Review, and as necessary, modify performance rating systems and all other qualification and testing requirements used in selecting personnel for city positions to ensure that they are job-related, valid under Federal, State and local law, and to the greatest extent possible, free from cultural bias and institu-

tionally discriminatory practices.", and "(f) Instruct all staff with hiring responsibilities that underrepresented persons are to be sought for appointments and that Civil Service selective certification procedures are available for use to this end."

5. That Resolution 23849 of the City Council of The City of Seattle, passed October 16, 1972, declares the policy of the City for Affirmative Action Programs by City departments to achieve equality of City employment opportunities for members of minority races, women, and persons over 40 years of age, and affirms the Mayor's Executive Order of August 25, 1972. That Ordinance 101548 of The City of Seattle, approved by the Mayor on October 27, 1972, provides for implementation of the affirmative action program for City employment and requires all departments to establish and maintain effective affirmative action programs of employment opportunity as set forth in the Mayor's Executive Order of August 25, 1972, including the setting of goals and timetables for the achievement of equality of work force representation. Said ordinance also provides that no departmental budget shall be approved as to any department which fails to submit reports required by said ordinance.

6. The Civil Service Commission is established by Article XVI of the City Charter, and is authorized thereby to make rules to carry out its functions.

7. Article XVI, Section 9 of the City Charter provides that where a head of a department notifies the Civil Service Commission of a vacancy in an office classified under Article XVI, the Commission shall certify to him such number of candidates, not less than five if there shall be so many eligible, standing first upon the register for the class or grade to which such position belongs

as shall be equal to twenty-five percent of the total number of candidates on said register.

8. That Seattle's civil service tests have had the effect, in some cases, of discriminating against minority applicants among thos deemed eligible for appointment in accordance with provisions of Charter Article XVI, Section 9, as determined by the results of those examinations; and said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore have little or no chance of being employed.

9. The Seattle Civil Service Commission has promulgated rules for the administration of the Civil Service Department, including Rule 7 relating to certification of candidates. That Rule 7.03(j) authorizes certification of minority persons only when requested by an appointing autority as necessary to implement the affirmative action policy of the city.

10. That pursuant to the City's affirmative action policy for employment opportunities for minorities, the Engineering Department on June 21, 1972 promulgated a departmental policy statement which established as the goal of that department the achievement of ratios of minority employment in each Civil Service classification comparable to the ratios of these same minorities in the Seattle Community, and adopted as an emergency measure during 1972, 1973 and 1974 a rule that the first of every three vacancies resulting from retirement or termination in under-represented classes will be filled with appropriate minorities. Such appointments are to be made from Civil Service registers whenever possible and by provisional appointments as necessary.

11. That plaintiff, a Caucasian, is on the promotional eligible register for signal electrician foreman, established after an examination in 1969, with a department grade of 88.58. That Emeliano Ponce, a minority applicant, is also on the eligible register with a department grade of 81.83.

12. That to fill a vacancy of Signal Electrician Foreman for the City Engineering Department requested and the Civil Service Commission certified the only minority applicant on the eligible register, Emeliano Ponce, and passed over a non-minority eligible, Wesley Brabant, who had a higher test score.

ISSUES OF LAW

The parties agree that the following are the issues of law presented by the foregoing facts:

1. Whether Rule 7.03(j) conflicts with Article XVI, Section 9 of the City Charter.

2. Whether compliance with Article XVI, Section 9 is excused by overriding provisions of state or federal law.

3. Whether the selective certification of Mr. Ponce to a vacant position of Signal Electrician Foreman pursuant to Rule 7.03(j) conformed to law.

4. Whether Rule 7.03(j) constitutes illegal delegation of the Civil Service Commission's discretionary power to its Secretary.

5. Whether The City of Seattle has a legal duty to take affirmative action to eliminate the effects of past discrimination.

6. Whether the City's duty referred to in Paragraph 5 is as to particular positions,

by particular departments of the City, or in civil service positions generally? Must it be shown that a civil service test for a particular position is discriminatory, or is it sufficient to show that civil service tests generally of the City, as presently devised, are discriminatory.

7. Whether Rule 7.03(j) conflicts with Section 703(j) of Title VII of the Civil Rights Act of 1964.

8. Whether Rule 7.03(j) is a reasonable and necessary method of eliminating the effects of past discrimination.

The parties agree that there is no constitutional question of equal protection of the laws and due process presented, the same having been disposed of in De Funis v. Odegaard, 82 Wn.2d 11.

DATED this 7th day of September, 1973.

_____
Attorney for Plaintiffs

_____
Attorney for Defendants

_____
Attorney for Intervenors

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-196

WESLEY BRABANT,
Petitioner,

v.

THE CITY OF SEATTLE, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS ROBERT L. GREEN AND UNITED CONSTRUCTION WORKERS ASSOCIATION IN OPPOSITION

PETER GREENFIELD
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Green and U.C.W.A.

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

TABLE OF CONTENTS

TABLES OF AUTHORITY

Cases

INTRODUCTION

The petition for writ of certiorari, to which this brief[1] is a response, was filed by an unsuccessful white applicant for promotion within the Engineering Department of the City of Seattle, Washington. Petitioner has challenged a part of the City's procedure for hiring and promotion which represents, as the trial court and a unanimous state supreme court recognized, a straight-forward application of the principles of Title VII of the Civil Rights Act of 1964.[2]

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1. This brief is submitted by the United Construction Workers Association and Robert L. Green, intervenors in this case. The U.C.W.A. is a non-profit organization the objective of which is to promote equal employment opportunity. Mr. Green is a black member of the U.C.W.A. and a candidate for City employment who has passed one of the City's employment tests.

2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. Section 2000e et seq.

STATEMENT OF THE CASE[3]

1. The City's Ordinary Hiring Procedure

The City of Seattle has, at all times relevant to this case, given unvalidated employment tests—tests that have not been demonstrated to be job related—to applicants for employment or promotion and, at the time of trial, it was expected that validation would take a number of years. The tests and the hiring procedures based on them have had a disproportionately adverse impact on applicants of minority races. For example, in the category of position relevant to petitioner's complaint—foremen in the Engineering Department—6% of the positions (3 out of 50) were held by minority employees at the time

3. The facts of this case are not in dispute and were summarized by the Washington Supreme Court beginning at Lindsay v. Seattle, 86 Wn.2d 698, 700, 548 P.2d 320, 323, A-1, A-5. "A" references are to the appendix to the petition for writ of certiorari.

of the promotion at issue here. People of minority races accounted for 14.7% of the Seattle population according to the last census, and 14.5% of the civilian labor force according to the latest estimate by the Seattle Chamber of Commerce.[4] This situation had resulted, by 1973, in a formal charge by the United States Equal Employment Opportunity Commission that the City had engaged in unlawful employment practices in violation of Title VII.

In the ordinary instance of City hiring or promotion, a department head requests the names of eligible applicants from the Civil Service Commission.

4. Puget Sound Prospectus-Affirmative Action, an analysis of the local population and labor force based on the United States Census, and reports of the Washington State Employment Security Department and the Office of Program Planning and Fiscal Management. The document also contains projections through the present which indicate a steady increase in minority percentage of the labor force. Record on Appeal in the Washington Supreme Court, pp. 114-115.

The Commission certifies to the department head the names of all applicants who passed the applicable (unvalidated) employment test and whose scores were within the top 25% or among the top 5. Because this procedure, in conjunction with its unvalidated tests, had a disproportionately adverse impact on minority applicants, the City established goals for the achievement of an integrated work force, and adopted a limited remedial procedure referred to as "selective certification."

2. The City's Affirmative Action Procedure

Under the selective certification procedure, a department head obtains, in place of the names of all other eligible applicants, the name of the highest-scoring minority applicant who has passed the applicable test but whose score is neither within the top 25% nor among the top 5. Selective certi-

fication may be used to fill one out of three vacancies when necessary to further a department's affirmative action goals. Hiring or promotion of a selectively certified applicant is not automatic; a department head must exercise discretion and may reject an unsuitable applicant.[5]

3. The Background of This Litigation

Petitioner is an unsuccessful white applicant for a position in the Engineering Department who would have been considered for the position under the City's ordinary procedure. He commenced this litigation after the position was filled under the selective certification procedure.

The minority applicant who got the job petitioner was seeking was promoted from within the Engineering Department. The record of his previous performance,

---

5. Equal Employment Opportunity Statement, Engineering Department, Record on Appeal in the Washington Supreme Court, pp. 131-132.

as well as his test score, was available to the department head. While his passing score on the test was slightly lower than that of petitioner, the test itself was unvalidated. Petitioner offered no evidence that the small difference in scores had any relevance to the applicants' respective abilities to do the job.

The trial court entered a summary judgment dismissing petitioner's complaint and that judgment was affirmed by a unanimous state supreme court. Petitioner's contention that the selective certification procedure violated Title VII was rejected by the trial court and on appeal. With respect to petitioner's contention that selective certification violated the Fourteenth Amendment, the trial court "did not consider" it, and the state supreme court ruled that it "need not be considered"

on review. 86 Wn.2d at 708, 548 P.2d at 327, A-14.

ARGUMENT

1. The City's Ordinary Procedure Violates Title VII

Petitioner contends that "the City has not been proven to have discriminatory hiring patterns in practice." Petition, p. 15. However, he has stipulated that the City's test results "tend to cause the minority applicant to be placed at the lower end of the eligible registers and, therefore, have little or no chance of being employed." A-46. Furthermore, while he questions its implications, petitioner has not disputed the statistical evidence offered by the City, including the evidence that minority employees represented only 6% of the foremen in the Engineering Department in contrast to approximately 14.5% of the civilian labor force. Such

evidence of the disproportionate racial impact of employment tests, and hiring procedures based on them, makes a prima facie case of discrimination under Title VII. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). "[D]iscriminatory purpose need not be proved." Washington v. Davis, ___ U.S. ___, 48 L. Ed. 2d 597, 611, 96 S. Ct. 2040, 2051 (1976).

Petitioner has never contended that the City's employment tests could be shown to be job related. Not only have the tests themselves never been validated, but the requirement that an applicant score within the top 25% or among the top 5 scores—as distinguished from merely passing the test—has never been justified. The City's ordinary procedures create the kind of "'built-in headwinds' for minority groups" at which Title VII was directed. Griggs v. Duke Power Co., 401 U.S. at 432.

The City's ordinary employment procedures have been found, based on a rebuttable but unrebutted presumption, to result in invidious discrimination. Since the creation and validation of non-discriminatory, job-related procedures will require time, temporary remedial measures are called for. The continued use of the City's ordinary procedures, without remedial measures, would perpetuatue the discrimination that Title VII was enacted to end.

2. Selective Certification is an Appropriate Remedy

The measure under attack here affords a limited remedy only to those minority applicants who have taken and passed the City's current tests but who, like the minority applicant who got the job which petitioner sought, would have been precluded from consideration under the City's ordinary procedures. To compensate for the discriminatory effect

of those procedures, such minority applicants may be given a limited preference.

One consequence of such a limited preference is that applicants like petitioner lose the relative advantage that they had under the City's original, discriminatory procedures. But petitioner was not entitled to any such advantage.

Petitioner began with neither a right to, nor an expectation of, promotion. Had it not been for the selective certification procedure, petitioner would merely have been considered for the position at issue. His burden is less onerous than what this Court has sanctioned elsewhere. E.g., Franks v. Bowman Transportation Co., Inc., ___ U.S. ___, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976).

The Washington Supreme Court's application of Title VII in this case is consistent with prior decisions of this

court and does not warrant review. Review of petitioner's consitutional contention, not fully considered below, is not appropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

PETER GREENFIELD

Counsel for Respondents
Green and U.C.W.A.

August 31, 1976

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-196

WESLEY BRABANT,
Petitioner,

v.

THE CITY OF SEATTLE, ALLEN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, ROBERT L. GREEN and the UNITED CONSTRUCTION WORKERS ASSOCIATION,
Respondents.

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

BRIEF OF RESPONDENTS CITY OF SEATTLE and CIVIL SERVICE COMMISSIONERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CRAFTSMAN PRESS — WORD PROCESSING, SEATTLE

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Statutes

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-196

WESLEY BRABANT,
Petitioner,

v.

THE CITY OF SEATTLE, ALLEN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, ROBERT L. GREEN and the UNITED CONSTRUCTION WORKERS ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS CITY OF SEATTLE and CIVIL SERVICE COMMISSIONERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In this case the trial court and the Supreme Court on appeal upheld The City of Seattle's voluntary efforts to comply with Title VII of the Civil Rights Act

of 1964 by the adoption of an affirmative action program, and the selective certification for employment of only minority applicants on certain occasions to implement such affirmative action program.

The trial court's conclusions, set forth in the Summary Judgment of Dismissal, reveal the factual and legal bases for its decision:

> 1. Under Amendment 14 of the United States Constitution and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C.A. secs. 2000(e) et seq.), and Executive Order 11246, as amended, The City of Seattle has a legal duty to take affirmative action to eliminate the effects of past racial discrimination in City employee selection processes and to prevent such racial discrimination from occurring in the future.
>
> * * *
>
> 4. That portion of the affirmative action program of the Engineering Department by which the first of every three vacancies created by retirement or resignation will be filled with a minority application who has passed the required civil service examination does not constitute the adoption of a quota system, but is rather a tool to accomplish the legitimate goals of said program within the timetable established to reach such goals.

(Emphasis supplied)

> 5. Selective certification is lawful in connection with promotional eligible registers because the opportunities for minorities on promotional registers are probably even more limited than on open competitive eligible registers.
>
> 6. The existence of other methods of taking affirmative action to eliminate the effects of past and present discrimination does not preclude the use of selective certification.
>
> 7. The fact that the duty to take affirmative action was recognized voluntarily by The City of Seattle, rather than being imposed by judicial mandate, is immaterial.
>
> 8. The elimination of the effects of past and present discrimination is a legitimate public purpose, and selective certification is a reasonable and effective means of accomplishing such purpose.
>
> 9. The City of Seattle has satisfied the burden of showing the necessity for taking affirmative action to eliminate the effects of past and present discrimination in its employees selection processes; and a showing

> that the City's civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment in accordance with provisions of charter Article XVI, Section 9, as determined by the results of those examinations, and that said results tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore to have little or no chance of being employed, is sufficient in such connection.

COUNTERSTATEMENT OF THE CASE

The City of Seattle, a city of the first class, is an "employer" under Title VII of the Civil Rights Act of 1964, and subject to the duties of an employer fixed by that act to refrain from engaging in racial discrimination in employment, and to take affirmative action to eliminate the effects of past discrimination. 42 U.S.C.A. § 2000e, et seq.

In addition, Seattle contracts with the United States for millions of dollars of federal financial assistance and as

such is obligated by Executive Order 11246, as amended, to take affirmative action to avoid and eliminate racial discrimination in city employment.

Pursuant to its local procedures, The City of Seattle established an "Affirmative Action Program," the goal of which is to increase the number of underrepresented minority persons employed by the City to correspond with their statistical composition within the available work force in the city.

It was established in the court below by stipulation of facts and by affidavit that Seattle's Civil Service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment, as determined by the results of those examinations; and that such results tended to cause the minority applicants to be placed at the lower end of the eligible registers where they had

little or no chance of being employed. To overcome this discriminatory effect, the Civil Service Commission adopted Rule 7.03(j), which authorizes the submission of the names of minority eligibles to an employing department when deemed necessary by the department head and the Secretary of the Civil Service Commission to implement the affirmative action program. This process is known in Seattle as "Selective Certification," and was used to fill a promotional position with a minority eligible who stood below petitioner on the eligible register and was in fact beyond reach under the usual certification pro= cess. The process and its specific applica= tion were upheld by the Supreme Court of Washington.

GROUNDS FOR OPPOSING WRIT

Respondents oppose the granting of a writ of certiorari to the Washington Supreme Court on the following grounds:

1. That the constitutional question posed by petitioner was not presented to nor decided by the court below.

2. That the issue posed as to Title VII presents no federal question of substance not heretofore determined by this court or in disaccord with other applicable decisions of this court.

ARGUMENT

Much of petitioner's petition is devoted to an effort to escape the effect of a stipulation, attached to its petition as Appendix G and mislabeled "Answer in Intervention," in which he agreed in the trial court that:

> . . . there is no constitutional question of equal protection of

> the law and due process presented, the same having been disposed of in DeFunis v. Odegaard, 82 Wn.2d 11.

Petitioner attempted to revive the federal constitutional issue in his appeal to the Washington Supreme Court, but respondents argued successfully to that court that parties to litigation who stipulate to facts and contentions are bound by their agreements, and that the appellate courts have no authority to disturb the agreement. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 P. 509 (1909); Harstad v. Metcalf, 56 Wn.2d 239, 351 P.2d 1037 (1960). The same rule is binding upon this court. In any event, the constitutional argument cannot be considered by this court since it was not considered either by the trial court or by the Supreme Court of Washington. Street v. New York, 394 U.S. 576, 22 L. Ed. 572, 89 S. Ct. 1354 (1969); Walters

v. St. Lewis, 347 U.S. 231, 98 L. Ed. 660, 74 S. Ct. 505 (1953).

Even if petitioner is entitled to raise the constitutional question of equal protection in this court, no new question of importance is presented because The City of Seattle is proceeding in accordance with the principles announced by this court in previous cases.

In Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971), this court held:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices.

Griggs at 163.

Then, in Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2268 (1975), this Court held that pre-employment tests may be racially discriminatry in effect although not in intent and that such discrimination is prohibited under Title VII of the Civil Rights Act, as amended, and reaffirmed the principle enunciated in Griggs, that Title VII is not concerned with an employer's good intent or absence of discriminatory intent but with the consequences of employment practices. The court then went on to hold that a prima facie case of discrimination was shown by tests which select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. Albemarle at 301. This view was echoed in a later case wherein the court stated that employees proceeding under Title VII need not concern themselves with the employer's

possible discriminatory purpose but may focus solely on the racially differential impact of the challenged practice. Washington v. Davis, ___ U.S. ___, 48 L. Ed. 2d 597, ___ S. Ct. ___ (June, 1976).

In other words, if petitioner were a racial minority for employment alleging employment discrimination and seeking relief from this court under Title VII, he would have been able to establish a prima facie case of employment discrimination on statistics alone. But this petitioner is not of a racial minority. He is white. Yet in this petition he would hold the City to be a different and higher standard. He would require that the City prove specific and intentional discrimination to justify use of the selective certification process. That demand is unjustified and unnecessary under law.

Affirmative action is not limited to remedying "intentional" discrimination. Franks v. Bowman Transp. Co., ___ U.S. ___, 47 L. Ed. 2d 444, 96 S. Ct. ___ (March, 1976); Boston Ch. of NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), NAACP v. Allan, 493 F.2d 614 (5th Cir. 1974). In any event, "intentional" means deliberate and not accidental and may be inferred from operation and effect of employment practices, Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973), and used to correct such practices, United States v. International Brotherhood of Electrical Workers, 428 F.2d 144, 149 (6th Cir. 1970), cert. den., 400 U.S. 943, 27 L. Ed. 2d 248, 91 S. Ct. 245; United States v. Wood Wire & Metal Lath Union, 471 F.2d 408, 413 (2d Cir. 1973), cert. den., 412 U.S. 939, 37 L. Ed. 2d 398, 93 S. Ct. 2773 (1973).

The necessity of remedial and compensatory action and the lawfulness of

such action where the effects of unlawful employment practices continue to exist can no longer be seriously questioned. Franks v. Bowman Transp. Co., supra; Albemarle Paper Co., supra; Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L. Ed. 2d 514, ___ S. Ct. ___ (March, 1975); Griggs, supra. The fact that such remedial effort is voluntary instead of court-ordered should make no difference. As this court has already indicated, cooperation and voluntary compliance with the Civil Rights Act's mandate are preferred means of achieving its goals. Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 156, 94 S. Ct. 1011 (1974).

Of necessity, affirmative action programs consider race in the development of goals, timetables and strategies to overcome the effects of past discrimination. Color-consciousness is approved under such circumstances, Boston Ch. of NAACP, Inc. v. Beecher,

504 F.2d 1017 (1st Cir. 1974); Rios v. Enterprises Assn. of Steamfitters, 501 F.2d 622 (2d Cir. 1974), and does not violate Title VII. Contractors Assn. of Eastern Pa. v. Sec. of Labor, 442 F.2d 159, 173 (3d Cir. 1971), cert. den., 404 U.S. 854, 30 L. Ed. 2d 95, 92 S. Ct. 98. In addition to paragraph 8 of the stipulation of facts, a compelling showing of the discriminatory effects of Seattle's past practices was made in the affidavit of Philip Y. Hayasaka, attached hereto as Appendix A.

A central purpose of Title VII is to make whole the victims of discrimination, and so long as the number of employment opportunities is finite, the expectations of other arguably innocent employees will be diminished in the process. Franks v. Bowman Transp. Co., ___ U.S. ___, 47 L. Ed. 2d 444, 96 S. Ct. ___ (1976). The City of Seattle, using tests which have not been validated

under the regulations of the Equal Employment Opportunities Commission and recognizing their discriminatory effect, voluntarily adopted a reasonable and effective program to achieve the goals of Title VII without requiring the employment of unqualified persons, without imposing an absolute preference for minorities, and without displacing any person presently holding a position. All of this is potentially within the sweep of a federal court injunction to enforce Title VII rights against Seattle under existing law.

The petition to review Seattle's actions here should be denied.

Respectfully Submitted,

JOHN P. HARRIS
Corporation Counsel

GORDON F. CRANDALL
Chief Assistant

Attorneys for Respondents
City of Seattle and its
Civil Service Commissioners

APPENDIX A

[COPY RECEIVED
JUN 29 1973
Siderius, Lonergan & Crowley]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL E. LINDSAY, RON WATSON, and DAVID L. DAY, Plaintiffs,	)	
WESLEY BRABANT, Plaintiff in Intervention,	)	NO. 757 364
vs.	)	AFFIDAVIT OF PHILIP Y. HAYASAKA
CITY OF SEATTLE, ALLAN W. MUNRO, DONALD D. HALEY, ROBERT E. McGINTY, CIVIL SERVICE COMMISSIONERS, Defendants.	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF K I N G)

PHILIP Y. HAYASAKA, being first duly sworn, on oath deposes and says:

That he is the Director of the Department of Human Rights of The City of Seattle, and makes this affidavit from his own personal knowledge and information and is competent to testify hereto.

That the Department of Human Rights was established by Ordinance 97971, approved July 30, 1969

"to investigate, study and act to identify and relieve problems of human rights relating to race, religion, creed, color, or national origin; to design and carry out programs to promote equality, justice and understanding among all citizens of the City; to recommend policies to all departments and divisions of City government in matters affecting such human rights; and to recommend legislation for the implementation of such programs and policies."

That in 1969, the City had 10,294 employees, 780 or 7.6% of whom were members of minority races. The 1970 census indicates that of the 530,831 persons living in Seattle, 77,796 or 14.7% are minorities. On a bare statistical basis, therefore, minorities were then underrepresented on the work force of The City of Seattle.

Attached hereto as Exhibit "A" is a copy of Puget Sound Prospectus - Affirmative Action, published by the Seattle Chamber of Commerce which analyzes local population, labor force and and minority percentages in the labor force, based upon the U. S. Census and Washington State Employment Security Department and Washington State Office of Program Planning and Fiscal Management reports.

The Seattle Engineering Department on June 21, 1972 adopted an Equal Opportunity Policy, the aim of which is to insure full opportunity for minorities in all classifications of Engineering Department employment. To implement the policy, the Engineering Department resolved to fill the first of every three vacancies created by retirement or resignation with a minority applicant, even if such applicant were not in the top five (or 25%) on the list of eligibles. A copy of a synopsis of the policy statement is attached as Exhibit "B", and a copy of the

Engineering Department's Affirmative Action Program is attached as Exhibit "C".

On August 25, 1972, Mayor Wes Uhlman issued the "Mayor"s Executive Order Establishing an Affirmative Action Program for City Employment, a copy of which is attached as Exhibit "D". In addition, Mayor Uhlman recently transmitted a comprehensive affirmative action program for city employment to the City Council for its consideration and adoption as official City policy. A copy of said program will be supplied by later affidavit.

Statistics pertaining to The City of Seattle and its Engineering Department work force are collected and developed by the personnel division of the Executive Department and the Department of Human Rights on a quarterly basis. The following statistics regarding the Engineering Department are from the December 31, 1972 quarterly report and were considered by the Department of Human Rights prior to the latter department's approval of the use of selective certification for filling the position of Signal Electrician Foreman in question in this case:

1. Of the 3 Signal Electrician Foremen in the Engineering Department, 0 were minorities.

2. Of the 50 Foremen in the Engineering Department, 3 or 6% were minorities.

3. Of the 141 individuals in the "Craftsman" category at the Engineering Department, 12 or 8.5% were minorities.

4. Of the 136 "unskilled laborers" in the Engineering Department, 50 or 36.7% were minorities.

5. Of the 1,178 employes in the Engineering Department, 199 or 16.9% were minorities.

6. Of the 10,630 persons employed by The City of Seattle, 1,359 or 12.7% were minorities.

In 1969, The City of Seattle employed 10,294 persons, 708 of whom or 7.6% were minorities. In 1971, The City of Seattle employed 10,921 persons of which 1,198 or 11.0% were minorities. The most current quarterly report, dated April 17, 1973, indicates that The City of Seattle employs 10,723 persons of which 1,450 or 13.6% are minorities.

The City of Seattle is the recipient of millions of dollars in Federal grants each year, which grants require the City to have and enforce effective affirmative action programs for City employment.

Attached hereto as Exhibit "E" is a copy of a memorandum from Assistant Attorney General Morton M. Tytler dated October 25, 1972, reviewing The City of Seattle's affirmative action program as it existed on September 20, 1972. Mr. Tytler is the legal adviser to the Washington State Human Rights Commission,

/s/ PHILIP Y. HAYASAKA
PHYLIP Y. HAYASAKA

SUBSCRIBED AND SWORN to before me this 28 day of June 1973.

/s/ RON CHATBURN
Notary Public in and for the State of Washington, residing at Seattle

[EXHIBITS NOT ATTACHED]